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UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

ADIRONDACK TRANSIT LINES, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR DECREE IN QUESTION.

The plaintiff having this day presented its petition for appeal now files this statement pursuant to Rule XII of the General Rules of the United States Supreme Court as to the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the final judgment or decree in question.

(A) The Statutory Provisions Believed to Sustain the Jurisdiction

Title 49 of the United States Code, Section 305

"(g) Court review of Commission's orders; compelling Commission to take jurisdiction. Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title: Provided, That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any

such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 43 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction."

"(h) Application of section 17 of this title. All the provisions of section 17 of this title shall apply to all proceedings under this chapter."

Feb. 4, 1887, c. 104, Part II, Para. 205, as added Aug. 9, 1935, c. 498, 49 Stat. 548 and amended June 29, 1938, c. 811, Para. 5-7, 52 Stat. 1237, 1238; Sept. 18, 1940, c. 722, Title I, Para. 20 (c, d), 54 Stat. 922, 923."

Title 49 of the United States Code, Section 17

"(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

Feb. 4, 1887 c. 104, Part I, Para. 17, 24 Stat. 385, as amended Mar. 2, 1889, c. 382, Para. 6, 25 Stat. 861; Aug. 9, 1917, c. 50, Para. 2, 40 Stat. 270; Feb. 28, 1920, c. 91, Para. 430-432, 41 Stat. 492, 493; Feb. 28, 1933, c. 136, 47 Stat. 1368; Aug. 9, 1935, c. 496, Para. 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, Para. 12, 54 Stat. 913."

Title 28 of the United States Code Section 41

Original jurisdiction. The district courts shall have original jurisdiction as follows:

"(28) Setting aside order of Interstate Commerce Commission. Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, Para. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Para. 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

Title 28 of the United States Code Section 47

"Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application to other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the

Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Urgent Deficiencies Act of Oct. 22, 1913, c. 32, 38 Stat. 220.)"

Title 28 of the United States Code Section 47a.

"Appeal to Supreme Court from final decree; time for taking; priority. A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants

in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court.

(Mar. 3, 1911, c. 231, Para. 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)"

Title 28 of the United States Code Section 44

"Procedure in certain cases under interstate commerce laws; service of processes of court. The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, c. 32, 38 Stat. 220.)"

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order, judgment or decree in question by virtue of the express statutory provisions above set forth.

(B) This proceeding or action does not involve the validity of any statute of any state, or any statute or treaty of the United States.

(C) The Date of the Judgment or Decree Sought to Be Reviewed, and the Date Upon Which Application for Appeal Was Presented.

The final judgment or decree herein sought to be reviewed was rendered and entered on November 4, 1944.

The petition for appeal herein was presented and filed on the 2nd day of December, 1944.

(D) The Statement Showing the Nature of the Case and the Rulings of the Court Were Such as to Present the Case Within the Jurisdictional Provisions Relied Upon.

On June 6, 1944 the Interstate Commerce Commission in a complaint proceeding known as MC C-164, at a hearing on reconsideration, entered a cease and desist order, which among other things directed the Adirondack Transit Lines, Inc., the defendant in the said complaint proceeding before the Interstate Commerce Commission, to cease operating between New York City, New York and Weehawken, New Jersey via the Lincoln Tunnel, a vehicular tube connecting the aforesaid cities, and Boulevard East in Weehawken, New Jersey from the New Jersey entrance of the Lincoln Tunnel to the junction of Boulevard East with Pershing Road in New Jersey. The complaint action was in all other respects dismissed by said order.

Pursuant to the statutory provisions hereinbefore set forth, the Adirondack Transit Lines, Inc., the defendant in the aforementioned complaint case, filed a petition on July 27, 1944 in the United States District Court for the Southern District of New York, wherein the plaintiff prayed, in addition to its prayer to set aside, annul, suspend, or permanently enjoin that portion of said order of the said Commission relating to the plaintiff's use of the Lincoln Tunnel and Boulevard East in New Jersey as a route between New York City, New York and Weehawken, New Jersey, for a temporary stay or interlocutory injunction of said portion of said order, pending full and final hearing by the Court.

Pursuant to statute and on the application of the plaintiff the District Judge convened a statutory Three Judge Court to hear the plaintiff's case. The Interstate Commerce Commission at the request of the District Judge extended the effective date of its said order until October 16, 1944 and again on a further request by the District Judge extended the effective date of its order to a date subsequent to the final hearing of the matter, thereby obviating any necessity of consideration by the Court of the plaintiff's prayer for temporary or interlocutory relief; and no hearing on the temporary or interlocutory relief was ever had. The cause duly came on for full and final hearing before the Three Judge Court, and after due deliberation the Court, on the motion of the Attorneys for the United States and the Interstate Commerce Commission respectively, dismissed the plaintiff's petition, rendered its opinion and duly signed and filed its Finding of Facts and Conclusions of Law.

This appeal is prosecuted from the final decree or judgment entered on the 4th day of November, 1944 of the Three Judge Court dismissing the plaintiff's petition to

suspend, annul, set aside or permanently enjoin the said portion of the said order of the Interstate Commerce Commission.

It is respectfully contended that the nature of the instant case and the rulings of the Court are such as to bring the case within the jurisdictional provisions relied upon.

(E) Statement of the Grounds Upon Which It Is Contended That the Questions Involved Herein Are Substantial.

The plaintiff is an omnibus corporation operating numerous omnibuses owned by it in daily service over more than five hundred (500) route miles of highway in the States of New York and New Jersey. It transports millions of passengers in its service annually. The City of New York is its principal terminal point and the largest community served by it. In the City of New York it makes junction with other bus lines operating to other points and places throughout the Eastern United States. Hundreds of thousands are carried annually on its lines which operate between New York City, New York and Weehawken, New Jersey. Almost all of said passengers from New York City are destined to points beyond Weehawken, New Jersey. Almost all of its passengers transported into New York City originate at points beyond Weehawken, New Jersey. All of these passengers are concerned with the means of transportation between the City of New York and the New Jersey side of the Hudson River. The tunnel crossing between New York City, New York and Weehawken, New Jersey, affords an uninterrupted almost limitless capacity, speedy, safe, dependable and public highway. The compliance with the order of the said Interstate Commerce Commission and decision of the Court would obligate the plaintiff to transport

said passengers via the West Shore Railroad Ferry between New York City, New York and Weehawken, New Jersey. Such transportation would be subject to the restricted capacity of the ferry boats, dangers inherent in the use of them in foggy or inclement weather, slippery and icy ferry slips and narrow ferry aisles, the necessity for delay dependent upon ferry schedules and the dependence upon a private transportation facility. For all of said reasons the use of the tunnel is favored and needful in the public interest, safety, comfort, convenience and service. The ferry for said reasons is undesirable. Competing bus lines servicing the same areas via the tunnel would be able to attract from the plaintiff a great majority of the plaintiff's riders and thereby jeopardize the revenues and potentiality for continued service of the plaintiff. Those passengers of the plaintiff which are transported to or from points on the plaintiff's line to which there is no other service would be subjected to unreasonable and unwarranted delay in their journey. No better evidence of the desirability or preference for the use of the tunnel route over the ferry route could be given than the fact that all of the bus lines which used the ferry prior to the inauguration of service via the tunnel are now in operation through the tunnel and no new lines have instituted or inaugurated service via the ferry.

The plaintiff has operated continuously for practically seven years via the tunnel. Reversion to the ferry would deprive its passengers of such proven satisfactory facility and could reasonably expect to result in so substantial a diminution of revenue as would prevent the plaintiff from being able to maintain its service. The plaintiff at points and places in the State of New York pursuant to the authority of the Public Service Commission of the State of New York is engaged in the operation of local intrastate transportation of passengers. Some of this

service is rendered by vehicles which pass between New York City, New York and Weehawken, New Jersey, and the timeliness of the passage of the plaintiff's vehicles through the intrastate areas is of great importance and value to such passengers. The schedule can be reasonably and timely maintained through the use of the tunnel but would be undependable if the plaintiff were required to use the ferry. In many areas the plaintiff's vehicles are the only common carrier transportation facility affording such intrastate service. In some instances timeliness of arrival at junction points on the route is important to passengers transported by it who seek transportation to points beyond on the buses of connecting carriers.

The questions involved herein arise under the provisions of Section 206 of the Interstate Commerce Act, Part II, Title 49 of the United States Code, Section 306a colloquially known as the "grandfather clause."

The plaintiff maintains that the order dated June 6, 1944, of the Interstate Commerce Commission deprives it of a vested right, to wit, the right to operate between New York City, New York and Weehawken, New Jersey, via the Lincoln Tunnel and on Boulevard East in New Jersey from the New Jersey entrance of the Lincoln Tunnel to the junction of Boulevard East with Pershing Road in New Jersey.

The plaintiff maintains that it received such operating rights by reason of a certificate of convenience and necessity issued to it by the Interstate Commerce Commission pursuant to Section 306a of Title 49 of the United States Code, or by reason of the Interstate Commerce Commission's acts of omission or commission in respect to an application filed by the plaintiff on December 23, 1937, on forms prescribed by the Interstate Commerce Commission for a change of route authorizing the aforementioned route

between New York City, New York and Weehawken, New Jersey.

The plaintiff contends that said order of the Interstate Commerce Commission in effect deprives the plaintiff of its said vested right without due process of law, such deprivation being repugnant to and in violation of the Fifth Amendment of the Constitution of the United States. The plaintiff further maintains that said order of the Interstate Commerce Commission amounts to a partial revocation, suspension or change of the plaintiff's certificate of convenience and necessity in violation of and without compliance with Section 312 of Title 49 of the United States Code, the statutory provision providing the manner by which a certificate of convenience and necessity issued by the Interstate Commerce Commission may be revoked, suspended or changed.

The Three Judge Court raised the question of whether the Interstate Commerce Commission could grant the authority the plaintiff claims it received, but did not affirmatively reach a conclusion on that point. These questions are of vital concern not only to this plaintiff but may be a concern to other interstate operators who received a like broad authority from the Interstate Commerce Commission.

A copy of the Three Judge Court's opinion, Findings of Fact and Conclusions of Law and final decree or judgment is appended hereto.

It is respectfully contended that the questions herein are substantial, highly debatable, and have been the source of various opinions emanating from the Interstate Commerce Commission itself.

(F) Cases Believed to Sustain the Jurisdiction

The following decisions of this Court are believed to sustain the jurisdiction of the Supreme Court of the United

States on a direct appeal to review the final judgment or decree here in question.

Ziffrin, Inc. v. *United States of America, et al.*, 318 U. S. 73;

Howard Hall Co., Inc., v. *United States of America, et al.*, 315 U. S. 495;

United States of America, et al. v. *Carolina Freight Carriers Corp.*, 315 U. S. 475;

United States of America, et al. v. *American Trucking Associations, Inc., et al.*, 310 U. S. 534;

United States of America, et al. v. *Maher, doing business as Interstate Buses*, 307 U. S. 148;

United States of America, et al. v. *Baltimore & Ohio Railroad Co., et al.*, 293 U. S. 454.

Respectfully submitted,

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CLARENCE E. HORN, JR.,
Of Counsel.

APPENDIX "A"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ADIRONDACK TRANSIT LINES, INC., *Plaintiff*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

Before Frank, Circuit Judge, and Leibell and Conger, District Judges.

Proceeding by plaintiff seeking to have a portion of an order of the Interstate Commerce Commission set aside. Dismissed.

Martin J. Kelly, Jr., (Clarence E. Horn, Jr., of counsel) for plaintiff.

James B. M. McNally, United States Attorney for the Southern District of New York (Wendell Berge, Assistant Attorney General, Edward Dumbauld, Special Assistant to the Attorney General, Daniel W. Knowlton, Chief Counsel and Nelson Thomas, Attorney Interstate Commerce Commission, of counsel) for defendants.

Henry P. Goldstein, for Manhattan Coach Line, Inc., Manhattan Transit Company, Westwood Transportation Co., Inc., Westwood Transportation Line, Inc., Inter-City Transportation Co., Inc., Jersey City and Lyndhurst Bus Co., Inc., and Mountain Transit Corporation, Intervenors.

Leland Taliaferro, for Public Service Interstate Transportation Company, Intervenor.

John F. Finerty and John E. Buck, for Hudson & Manhattan Railroad Company, Intervenor.

PER CURIAM:

1. Since the parties agree on the correctness of the facts stated in the Commission's opinion, as supplemented by the opinion of Division 5, we need not repeat them here.

2. Were we entirely free to consider the order of June 4, 1937, and the certificate issued in accordance therewith, without any regard to the Commission's subsequent interpretation in its opinion of June 6, 1944, we would independently for the following reasons, arrive at the same conclusion as did the Commission: (a) It is highly doubtful whether the Commission, in granting, as it did, a certificate pursuant solely to 49 U. S. C. A. Sec. 306, could validly authorize the use of a tunnel in existence neither in or before 1935 nor at the time of the issuance of the certificate. Accordingly, as the certificate did not unambiguously authorize such use, it should be interpreted not to permit it. (b) The certificate does not authorize transportation under but merely "across" the river. (c) The words in Sec. 306, "within the territory," "refer, we think, to carriers which, in the required period, had, in whole or part, no regular routes; and plaintiff did not come within that category. (d) The failure of the Commission to act on the application of December 23, 1937, was not the legal equivalent of an order granting the application; it is irrelevant that Division 5 failed to act on that application because it believed the order of June 4, 1937 already permitted the use of the tunnel.

3. But we must decide against plaintiff in any event. At best, the Commission's order is ambiguous. So regarding it, its interpretation is for the Commission; and the Courts cannot disregard such an interpretation in those circumstances unless it is clearly erroneous or arbitrary, and the interpretation here is not.

JEROME N. FRANK,
Circuit Judge.
VINCENT L. LEIBELL,
District Judge.
EDWARD A. CONGER,
District Judge.

Dated: October 16, 1944.

APPENDIX "B"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ADIRONDACK TRANSIT LINES, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Findings of Fact and Conclusions of Law

Findings of Fact

As both parties concede that the facts as stated in the Commission's opinion, supplemented by that of Division 5, are correct, we so find, and adopt them as our findings herein, and there is no occasion for this Court to repeat them.

Conclusions of Law

1. The Commission probably lacked power to grant a certificate pursuant to 49 U. S. C. A. Sec. 306, which authorized the use of a facility not in existence in or prior to 1935, or even at the time of the issuance of the certificate. Accordingly, if possible, the certificate should be so construed as not to authorize such use, and the certificate can be so construed.

2. Quite aside from the foregoing, the Commission's interpretation of its own order and certificate cannot be disregarded by the courts unless such interpretation is clearly erroneous or arbitrary, and the Commission's interpretation is neither.

3. The failure of the Commission to act on the application of December 23, 1937 is not the equivalent of Com-

mission action. It is irrelevant that no such action was taken because Division 5 thought an order superfluous.

The petition is dismissed.

JEROME N. FRANK,
Circuit Judge;
VINCENT L. LEIBELL,
District Judge;
EDWARD A. CONGER,
District Judge.

Dated: October 16, 1944.

APPENDIX "C"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ADIRONDACK TRANSIT LINES, INC., *Plaintiff,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Judgment

Civ. 26-508

This cause having duly come on for hearing before this court and the parties having appeared by their respective attorneys and having adduced their proofs, and due deliberation having been had and the court having rendered its opinion dismissing the petition, and Findings of Fact and Conclusions of Law having been signed and filed herein.

Now, on motion of John F. X. McGohey, United States Attorney, attorney for the United States of America and Nelson Thomas, attorney for Interstate Commerce Commission, it is

Ordered that the petition of the plaintiff be and the same is hereby dismissed and it is

Further Ordered And Adjudged that the defendants, United States of America and Interstate Commerce Commission, have and recover judgment, in the sum of $30.00 costs as taxed against the plaintiff, Adirondack Transit Lines, Inc., of Kingston, New York.

Dated: New York, Nov. 3rd, 1944.

JEROME N. FRANK,
Circuit Judge;
VINCENT L. LEIBELL,
District Judge;
EDWARD A. CONGER,
District Judge.

Judgment rendered. George J. H. Follmer. Nov. 4, 1944.

(6400)